

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-6120

In The
United States Court of Appeals

For the Second Circuit

LIONEL J. BASTIEN,

Plaintiff-Appellant,

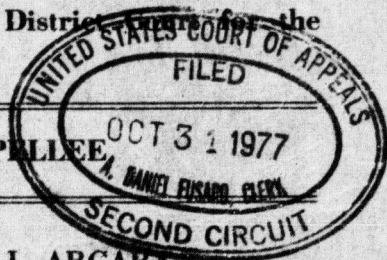
vs.

JOSEPH P. CALIFANO, Secretary of Health, Education and
Welfare,

Defendant-Appellee

Appeal from the United States District Court for the
Western District of New York

BRIEF FOR APPELLEE



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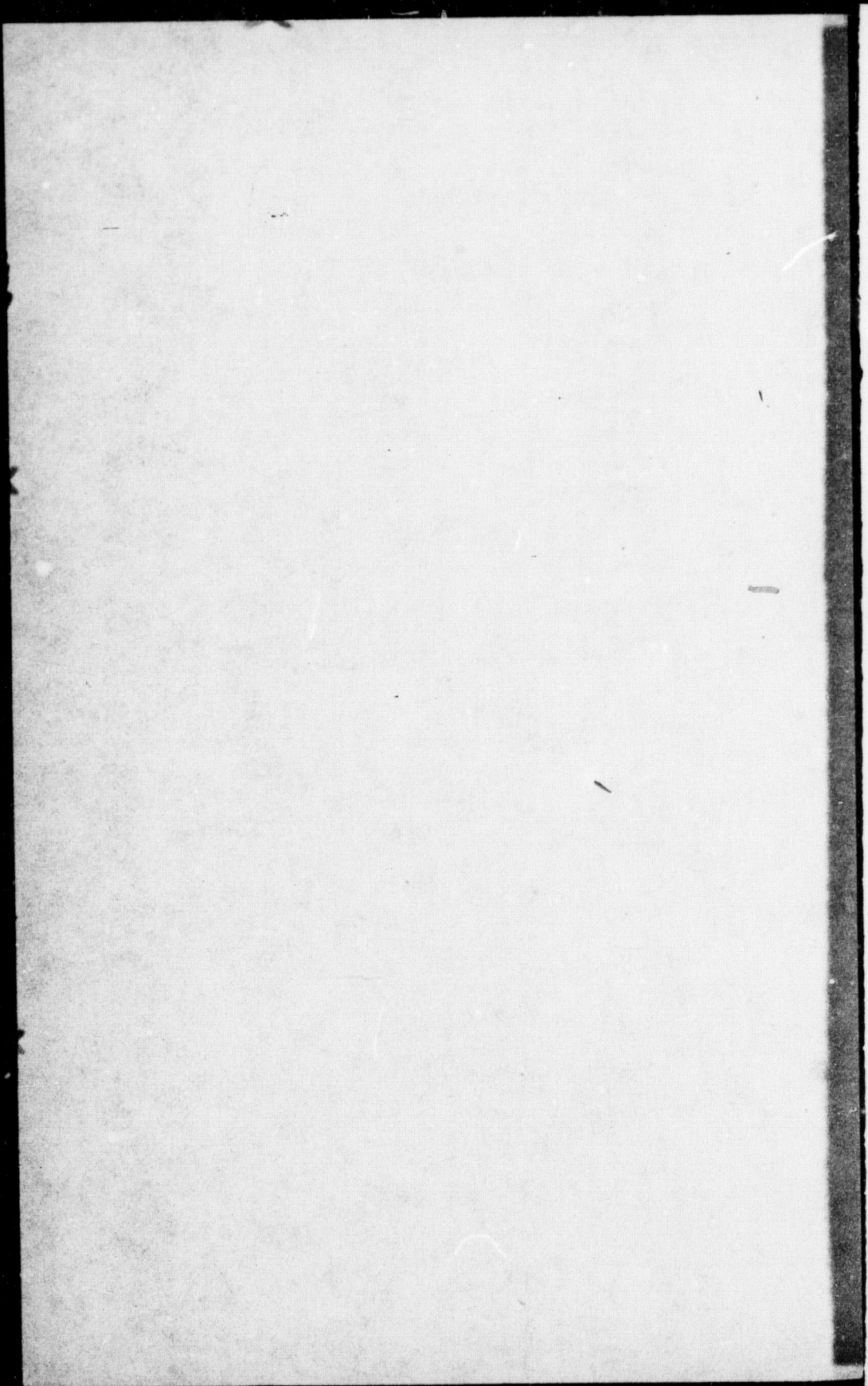


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Appeal from the United States District Court for the
Western District of New York

BRIEF FOR APPELLEE

Statement of Issues Presented

The only issue to be determined by the court is whether the Secretary's decision that appellant was not under a disability is supported by substantial evidence.

Applicable Statutes

Section 223 of the Act, 42 U.S.C.A. 423, provides that:

- “(a)(1) Every individual who —
- “(A) is insured for disability insurance benefits (as determined under subsection (c)(1)),
- “(B) has not attained the age of sixty-five,
- “(C) has filed application for disability insurance benefits,
- and

“(D) is under a disability (as defined in subsection (d)) shall be entitled to a disability insurance benefit . . . ending with the month preceding . . . the third month following the month in which his disability ceases.”

* * *

“(d)(1) The term ‘disability’ means

“(A) inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months;”

“(2) For purposes of paragraph (1)(a) —

“(A) an individual . . . shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), ‘work which exists in the national economy’ means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.

“(3) For purposes of this subsection, a ‘physical or mental impairment’ is an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory techniques.

“(4) The Secretary shall by regulations prescribe the criteria for determining when services performed or earnings derived from services demonstrate an individual’s ability to engage in substantial gainful activity. Notwithstanding the provisions of paragraph (2), an individual (other than an individual whose disability is blindness, as

defined in section 216 (i)(1)(B)) whose services or earnings meet such criteria shall, except for purposes of section 222(c), be found not to be disabled.

- “(5) An individual shall not be considered to be under a disability unless he furnishes such medical or other evidence of the existence thereof as the Secretary may require.”

The requirements of section 216(i) relating to the establishment and continuation of a period of disability are substantially the same as the above-quoted provisions of section 223.

Statement of the Case

This is an action brought under section 205(g) of the Social Security Act, as amended, (hereinafter referred to as the Act), 42 U.S.C. §405(g), to review a final determination of the Secretary of Health, Education, and Welfare, (hereinafter referred to as the Secretary), which denied appellant's application for a period of disability and disability insurance benefits.

Appellant filed an application for disability insurance benefits on January 21, 1974 (A 86-89). The application was denied initially (A 90-91), and on reconsideration (A 93). Appellant requested a hearing which was held on February 5, 1975 (A 56-85). The Administrative Law Judge before whom appellant appeared considered the case *de novo*, considered additional evidence, and on October 10, 1975, found that appellant was not under a disability (A 33-51). The decision of the Administrative Law Judge became the final decision of the Secretary when it was approved by the Appeals Council after consideration of additional evidence (A 234-235) on March 1, 1976 (A 28).

Appellant Bastien (hereinafter plaintiff or appellant) commenced this action to review the decision of the Secretary.

Plaintiff-Appellant and the Defendant cross-moved for summary judgment. On July 8, 1977 Judge Harold P. Burke granted summary judgment to the Secretary and plaintiff-appellant Bastien appealed.

Statement of Facts

Appellant, who was born on November 5, 1920, and has eight years of schooling (A 103) alleges that he has been disabled since June 29, 1973, due to arthritis in his back and impairments of his hands (A 86). Appellant was a cook in the Army for nine years, and then worked from February 21, 1951, to June 29, 1973, for the R.T. French Co., first as a "checker" on a freight loading dock and then as a fork lift operator, which involved heavy lifting (A 108-111). He has also worked as a janitor and laborer (A 204). Appellant suffered work-related injuries in May, 1968 (A 146-147), and in February, 1973 (A 204), for which he received workmen's compensation, but he resumed working after each injury, not stopping work until June 29, 1973, when his employer moved to Springfield, Missouri, and laid him off (A 120). From November 5, 1973 to January 18, 1974, Appellant worked at VWR but was dismissed, allegedly as an "insurance risk" (A 116-120).

The medical evidence of record may be summarized as follows:

On May 21, 1968 (A 146-147), appellant suffered an injury to his right shoulder, arm and upper back. He was referred to Dr. Norman Elson of Rochester, New York, as well as numerous physicians in that area (e.g. Drs. Philip G. Clarke, Lloyd H. Leve, Leonard L. Zinker, Fred W. Gieb, Della Porta, Joseph C. Maggic, et al.). On June 11, 1968 Dr. Philip G. Clarke, a radiologist noted that: "... there is no evidence of recent or old fracture or subluxation in the cervical region and no bone destructive changes or major anomalies are seen." He reported

that the seven cervical vertebral bodies were normally aligned (A 148).

Dr. Lloyd H. Leve reviewed appellant's history of complaints of back pain. He noted that some degenerative arthritis indications appeared on the X-rays taken of appellant. Noting that the patient might suffer from some sort of mild, permanent disability, he advised heat treatment, analgesics and the use of a towel collar. He believed that gradual resolution of this condition, brought about by an acute cervical strain (with radicular involvement), was possible. He reported appellant would be able to resume work within ten to fourteen days. Appellant returned, often complaining of considerable pain and/or numbness and discomfort in his right arm and radicular type pain in his right index finger and middle fingers. In his last report on April 14, 1969, Dr. Leve recommended that some "relevant restrictions" applied to appellant's work at R.T. French Company, but noted: "Personally I feel Mr. Bastien is employable and do not authorize any lost time from work" (A 149-158).

Other doctors made similar prognoses. Dr. Leonard L. Zinker, a neurological surgeon, reported to the Workmen's Compensation Board on December 17, 1968, that he could find no abnormal findings and discharged appellant, although appellant had come to him alleging trouble with his right forearm, and had in the past complained of aching pain in his arm (A 163).

Dr. Fred W. Gieb reported to Employer's Mutual Insurance Company on May 2, 1969, that a recent neurological examination of appellant was negative. After a myelogram was performed on May 20, 1969, Dr. Gieb reported that it was completely negative, and stated: "I certainly thought that this man would have something with the findings, but apparently there is nothing within the canal." On June 6, 1969, Dr. Gieb's impression summed up much of the pre-1973 medical evidence:

"I told the patient that I did not think he needed any further medical treatment observational care. He is working. I do not think there is anything we can come up with so far as any tangible means of diagnosis to corroborate his subjective symptoms." After repeated visits to Dr. Gieb in August 1969 and 1970, the doctor noted: "The symptomatology is identical, call it what you may. It is not a real neuritis such as we think of such a term medically . . . He has no working disability and I would say that his condition is no different now than it was previous to the time he was complaining of difficulty in May 1968" (A 164-171).

On October 20, 1970, appellant underwent surgery for carpal tunnel syndrome. Dr. Alexandra L. Feldmahn had seen appellant on several occasions, and had recommended surgery; after the surgery she prescribed medication (Prednisone), and observed his recovery. On February 26, 1971 she reported that appellant could return to work on March 1, 1971 (A 186-192). Dr. Roger Miller, appellant's surgeon, also appeared to concur with Dr. Feldmahn's view of recovery (A 193-197). A Dr. Mele reported to the Workmen's Compensation Board on May 24, 1971 that appellant had a mild partial disability based upon an examination of the right wrist and hand (A 198). A Dr. Della Porta reported (A 173-177) on November 11, 1971, that upon examination appellant's disability was noted as permanent and equal to a scheduled loss of the use of 10% of his right hand. Dr. Joseph C. Maggio on January 8, 1970 (A 185), found that appellant had no objective evidence of disability, although later Dr. Maggio stated that the claimant did have a minimal, partial disability (10% permanent loss of use of right hand) (A 178). In his report April 22, 1971, Dr. Maggio stated that appellant had made a complete recovery and that there was no reason for anticipating any permanency; he did not feel that ". . . this person at the time of my examination presented any objective signs of disability that could have resulted from any injury sustained in his accident of May of 1968" (A 181-182).

On February 23, 1973, the R.T. French Company filed another "Employer's Report of Injury" in regard to an accident at work suffered by Mr. Bastien, now a janitor/laborer (A 204). Appellant claimed to have strained his back pulling a cabinet off the wall with two other employees; this caused him considerable pain on the right side of his back. He was referred to Dr. D. Sewall Miller, Jr., after having been treated at the Genesee Emergency Hospital. When seen by Dr. Miller, an orthopedist (A 138), appellant was complaining of pain in the lower interscapular area and thoracolumbar junctional area. On examination, Dr. Miller found appellant had 60 degrees flexion with extension to 20 degrees. Left and right bending was limited by perhaps 10 degrees. There was mild to moderate bilateral paraspinal muscle mass spasm. Straight leg raising caused some mild, mid-back pain. However, confirmatory tests were negative. Appellant had fairly tight hamstrings with straight leg raising. Reflexes were symmetrical and normal. There were no presthesias or distal sensory or motor changes. Hips, knees and SI joint all appeared normal. Dr. Miller's diagnosis was acute thoracolumbar spine sprain of a moderate degree, which would gradually clear. Appellant was started on Valium and Bufferin. X-rays of the thoracolumbar spine revealed evidence of "degenerative changes involving the lower thoracic spine with osteophytes anteriorly and to the right." There was no evidence of fracture. On March 26, 1973, Dr. Miller noted that appellant continued to take Valium and Bufferin and was given instructions on hyperflexion exercises and told to start doing them. On May 1, 1973, Dr. Miller stated that appellant was progressing well on conservative management, but still complained of intermittent mid-thoracolumbar pain, aggravated by pivoting or lifting. However, in general, Dr. Miller noted that appellant's condition was much improved. His view was that appellant's back problem was slowly resolving with his extensive osteoarthritis which would never completely disappear. Appellant was told that he probably should return to work on

May 7, 1973. Chest films were taken in the office on May 1 and they revealed definite osteophytic spikes in the foramina between C-5, 6, and 7. The patient's reflexes were good, but he had a definite sensory deficit over C-6 and perhaps part of C-7. There was clear evidence, Dr. Miller stated, "of bony pathology in the nerve root outlet and I feel that this patient would probably be a good candidate for neurosurgical decompression of the nerve root at C-6 and perhaps of the C-7 nerve root." Appellant was also noted to have a positive "Adson's (sic) test on the right;" however, Dr. Miller felt this was not appellant's primary problem (A 217-219).

Medical evidence from Dr. Austin R. Leve, pertaining to appellant's second injury was contained in a letter dated April 23, 1973, wherein Dr. Leve noted that he had examined plaintiff on April 11, 1973, at the request of the Employer's Insurance of Wausau (A 220-221). His impression was, "I think this patient has a mild residual partial disability. I told him I thought he had recovered sufficiently to be able to return to work, however, I think he should avoid excessive bending and lifting for a few weeks before he resumes his regular duties." Dr. Leve also stated, "I see no basis to anticipate any permanency here."

X-rays taken at the Genesee Hospital on May 31, 1973 showed a mild tortuosity of the aorta and June 11, 1973, showed a negative cervical myelogram (A 222-223). On June 5, 1973 (A 199-202), Dr. William W. Cotanch of Rochester reported seeing appellant, who came to him complaining of the same symptoms which had led to his former myelogram. Dr. Cotanch believed that he had little alternative but to repeat myelography. This was performed at the Genesee Hospital on June 4, 1973, as noted above, and no significant etiology for appellant's symptoms was found. The study was interpreted as normal; Dr. Cotanch noted that there was no definitive evidence to substantiate any cervical nerve root involvement,

and he expected appellant's symptoms were related to carpal tunnel problem.

On June 20, 1973 Dr. Miller stated that he had prescribed Indocin for appellant, who alleged chronic pain not radiating to either leg. Dr. Miller believed that appellant had been back at work without much difficulty (A 215). On August 22, 1973 (A 214), appellant was reported by Dr. Miller to have a primary complaint of index finger numbness and occasional shoulder arm pain associated with his old cervical spine injury and osteoarthritis with compression of cervical nerve. Dr. Miller viewed his back problem as being only a minor annoyance.

At that time, he stated, could resume all his normal activities. Dr. Della Porta, a Workmen's Compensation Board physician, stated on January 3, 1974 that plaintiff had a "mild partial disability," after an examination revealed no muscle spasm or deformity of the back. In another statement April 15, 1974, Dr. Della Porta stated again that appellant had a mild, partial disability (A 224, 225). On January 14, 1974 (A 212-213), Dr. Miller noted that appellant had suffered intermittent repeated problems with his back, but these had been controlled by medication and by rest. However, it was at this time that appellant described his problem with employability and that Dr. Miller opined for the first time that appellant was "permanently disabled" since he lost his job and nobody was willing to hire him. On examination, appellant continued to exhibit marked limitation of spine motion. Forward flexion at the trunk was limited to about 40 to 45 degrees. Repeat X-rays of the thoracic lumbar area revealed severe degenerative arthritic changes in the thoracic spine, most noticeable from the thoracic levels T-8 to T-12. In this area appellant had large osteophytes both anteriorly and laterally with some bridging. Dr. Miller's view was, "I feel that the patient has some degenerative arthritis and that the injury at R. T French Company has set off a chain of events which is evidently irreversible. I feel that the patient is totally and permanently disabled for his previous type of heavy

lifting." On January 3, 1974, Dr. Maggio concluded that appellant had a mild partial disability in the low thoracic lumbar areas of the back (A 227), but on April 15, 1974 (A 226), Dr. Maggio stated that appellant had no disability from his accident of February 1973.

On February 18, 1974, Dr. Miller advised that appellant had appeared in his office on February 4 feeling "generally lousy;" upon examination Dr. Miller thought that a large sebaceous cyst had become infected and referred appellant for possible drainage. On March 21, 1974, Dr. Miller reported that the large sebaceous cyst was drained. He noted again appellant's complaints of back pain, neck pain, and lack of neck motion, and stated that these were all essentially secondary to severe degenerative arthritis (A 210-211). On March 15, 1974 Dr. Norman Engel, an orthopedic surgeon, reported for workmen's compensation purposes on an examination and review of appellant's X-rays (especially the X-ray films of April 1973 which revealed degenerative changes at level C-5, C-6 and C-7, characterized by hypertrophic changes encroaching upon the corresponding intervertebral foramina). Dr. Engel concluded, "I find this patient is having degenerative changes of the cervical spine and in the lower thoracic spine which certainly long antedated his injury of February 1973. I believe that the accident of February 22, did give rise to an aggravation of the pre-existing degenerative changes in the lower thoracic spine and that he did go into recovery from this aggravation as reflected in Dr. Miller's report of August 22, 1973, wherein he reported that the patient had essentially recovered from his previous injury; that he should experience recurrent episodes of pain in his mid and lower back and his neck is in the very nature of an essentially degenerative process and does not, in my judgment, stem solely because of the injury of February 22, 1973. There is no doubt that his degenerative process, subject as it is to aggravation by stress, limits him in job choices, but certainly does not render him as totally disabled" (A 228-230).

On May 21, 1974, Dr. Miller wrote that appellant had a partial disability, secondary to the accident, but in fact he believed that the accident had activated and aggravated appellant's underlying condition. Dr. Miller concluded by noting that appellant was not totally disabled because of his accident (A 209). On June 25, 1974, however, Dr. Miller stated: "I feel the patient does have advancing degenerative arthritis and because of this associated with his obesity and what appears to be a bilateral thoracic outlet syndrome, he is for all intents and purposes totally disabled. I do not feel he will be able to return to work even if a job is available." Further, he stated: "I feel that his accident at work played only a small part in the prolonged and progressive illness that this patient has. It appeared to be a triggering event, probably rating about 25% of the total disability" (A 133). On July 1, 1974 Dr. Miller viewed appellant as more than 50% disabled (A 208). On August 30, 1974, Dr. Miller stated: "I feel he has generalized, progressive, degenerative arthritis and perhaps he should have a more complete work-up by the arthritis unit of Strong Memorial Hospital" (A 207). On October 9, 1974 the Genesee Hospital's Department of Radiology reported to the New York State Bureau of Disability Determinations on X-rays taken of appellant's cervical spine, most marked at the C-6 through 7 and also present at C-4 through 5 and C-5 through 6. X-rays of the dorsal spine showed mild dorsal spine degenerative change of the lumbar spine. There was decreased height at L4 through 5 intervertebral disc space with mild osteophyte formation at this level and also at L3 through 4. Milographic contrast material was present (A 137).

Dr. Marvin N. Goldstein, a neurologist (A 139), on October 11, 1974 (A 136), reported that appellant appeared for a complete neurological examination and that he walked slowly and stiffly into the office holding his neck tilted to the right. Noting that appellant appeared to "give way" during his examination of muscle strength, Dr. Goldstein ventured that he

could not tell whether this was voluntary or due to pain. Appellant described himself as having total lack of perception of light touch, pinprick, or vibration distal to both shoulders and both knees. However, he was able to identify numbers written on the skin of his hands. Dr. Goldstein concluded that there was some evidence of spinal arthritis, although he was unable to clearly document the presence of weakness and/or pain. At the time of Dr. Goldstein's examination appellant was apparently receiving traction, Aspirin and Valium for treatment purposes.

On November 26, 1974, Dr. Miller reported that he felt that appellant had a severe, progressive, degenerative arthritis which was not responding to conservative therapy. He prescribed a new medication, Motrin, and stated, "there is really very little I can do for this man." The possibility of doing an anterior disc excision and fusion had been considered, but Dr. Miller did not wish to raise appellant's hopes (A 206). On February 20, 1975, Dr. Miller further reported that appellant when seen on February 17, was having essentially no problems with his shoulder. His primary problems continued to be spinal, with stiffness and recurrent pain, associated with weather changes. Dr. Miller reported appellant had arthritis of the entire spine with limited lower back flexion and limited cervical spine rotation and extension. Dr. Miller noted that a neurosurgeon had worked up appellant and stated that appellant's condition was stable since his last visit to Dr. Miller. He still felt that appellant remained permanently disabled but Dr. Miller's concern was that he did not understand where appellant could return to work in the near future (A 205).

Considered for the first time by the Appeals Council was evidence of action taken by the New York State Workmen's Compensation Board on October 16, 1975, to reopen the determinations of April 24 and October 8, 1975, awarding appellant benefits based on permanent partial disability (A 234). The basis for the re-opening was said to be a report

from Dr. Miller of June 10, 1975, stating that appellant was totally disabled. Also considered was a report from Dr. Miller of September 23, 1975 to like effect (A 235). There is no evidence of record to indicate the results of the re-opening of appellant's workmen's compensation case.

Appellant testified that he suffers from high blood pressure, for which his own physician has prescribed medication. Appellant is also overweight; his weight fluctuates between 190 and 205 pounds (A 67).

The vocational and other evidence of record may be summarized as follows:

Appellant's employer, the R.T. French Company moved to Springfield, Missouri in 1973. Appellant received severance pay based upon the union contract. For this employer he had operated a fork lift on a platform and handled heavy drums, 700 to 1,200 pounds; however, he received help with the heavy drums from fellow employees. Previously, he had worked for eight years as a "checker" on the docks checking-off freight before it was loaded on a truck, had spent three years picking orders, and before that four years "pulling," along with other employees, box cars that were loaded and which weighed, when pulled, 90,000 to 100,000 pounds. Before that time he had worked on the "mustard line" packing 47 pound cases of mustard jars. He spent nine years, two months and 17 days as a cook in the U.S. Army, but received no special training in that field (A 68-74).

Appellant drives, but testified that he doesn't go far since his back gets tired. The farthest he drives is to Lyons, New York, 38 miles away; he makes no trips in excess of 75 to 100 miles. Appellant further testified he could not work due to complications from his condition, could not even cut the hedges or hold things in his hand. He cited an incident at home wherein he dropped his coffee cup as if he could not hold or grasp anything

and a force had opened his hand. The only thing he could do, he stated, was to guide an electric lawnmower while his wife and son raked up the grass. He hires boys to clean his driveway in the winter. He stated that he still cannot stoop over and instead he goes to the ground on one knee. He can't twist his neck. At the hearing appellant offered to undergo acupuncture if that would help him get a job (A 80-83).

ARGUMENT

The decision of the Secretary that appellant was not under a disability is supported by substantial evidence and is therefore entitled to affirmance.

In order to establish entitlement to a period of disability and disability insurance benefits appellant has the burden of establishing that he was unable to engage in substantial gainful activity by reason of a physical or mental impairment, which can be expected to result in death or which has lasted or can be expected to last for a continuous period of at least 12 months and the existence of which is demonstrated by evidence supported by data obtained by medically acceptable clinical and laboratory techniques, at a time when he met the insured status requirements of the Act. 42 U.S.C. §423(d). *Reyes Robles v. Finch*, 409 F. 2d 84 (1st Cir. 1969); *Franklin v. Secretary of Health, Education, and Welfare*, 393 F. 2d 640 (2d Cir. 1968); *Pickens v. Weinberger*, CCH Unemp. Ins. Rep. ¶17,609 (S.D.N.Y. April 29, 1974); *Quinn v. Richardson*, 353 F. Supp. 363 (E.D. Pa. 1973), *aff'd*, 485 F. 2d 681 (3d Cir. 1973); *de Jesus Faria v. Finch*, 336 F. Supp. 1069 (D.P.R. 1971).

The mere presence of a disease or impairment is not disabling within the meaning of the Social Security Act. It must be shown that the disease or impairment causes functional limitations which preclude appellant from engaging in any substantial gainful activity. *Reyes Robles v. Finch*, *supra*; *Gotshaw v.*

Ribicoff, 307 F. 2d 840 (4th Cir. 1962), *cert. denied*, 372 U.S. 945 (1963); *Ayala v. Secretary of Health, Education, and Welfare*, 372 F. Supp. 1216 (D.P.R. 1973); *de Jesus Faria v. Finch*, *supra*; *Mann v. Richardson*, 323 F. Supp. 175 (S.D.N.Y. 1971).

When making a finding as to appellant's ability or inability to engage in any substantial gainful activity, there are four elements of proof to be considered. They are: (1) objective medical facts and clinical findings; (2) diagnoses and medical opinions of examining physicians; (3) subjective evidence of pain and disability as testified to by appellant and corroborated by others who have observed him; and (4) appellant's age, educational background, and work history. All of these elements of proof must be considered together and in combination with each other. *Gold v. Secretary of Health, Education, and Welfare*, 463 F. 2d 38 (2d Cir. 1972); *DePaepe v. Richardson*, 464 F. 2d 92 (5th Cir. 1972); *Underwood v. Ribicoff*, 298 F. 2d 850 (4th Cir. 1962); *Ayala v. Secretary of Health, Education, and Welfare*, *supra*; *Quinn v. Richardson*, *supra*; *Toledo v. Secretary of Health, Education, and Welfare*, 308 F. Supp. 192 (D.P.R. 1970), *aff'd*, 435 F. 2d 1297 (1st Cir. 1971).

Section 205(g) of the Act, 42 U.S.C. §405(g), provides that the findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive. Accordingly, the Secretary's findings, if reasonable, should not be disturbed by the court on review. *Richardson v. Perales*, 402 U.S. 389 (1971); *Gonzalez v. Richardson* 455 F. 2d 953 (1st Cir. 1972); *Ginsburg v. Richardson*, 436 F.2d 1146 (3d Cir. 1971), *cert. denied*, 402 U.S. 976, *rehearing denied*, 403 U.S. 912 (1971); *DeNafo v. Finch*, 436 F. 2d 737 (3d Cir. 1971); *Levine v. Gardner*, 360 F. 2d 727 (2d Cir. 1966); *Wolf v. Secretary of Health, Education, and Welfare*, CCH Unemp. Ins. Rep. ¶14,202 (S.D.N.Y. March 10, 1975); *Lopez v. Secretary of Health, Education, and Welfare*, CCH Unemp. Ins. Rep.

¶14,047 (D.P.R. November 6, 1974); *Sanders v. Weinberger*, CCH Unemp. Ins. Rep. ¶14,053 (E.D.N.Y. November 1, 1974); *Hofacker v. Weinberger*, 382 F. Supp. 572 (S.D.N.Y. 1974). The conclusive effect of the substantial evidence rule applies not only with respect to the Secretary's findings as to basic evidentiary facts, but also to inferences and conclusions drawn therefrom. *Beane v. Richardson*, 457 F. 2d 758 (9th Cir. 1972), *cert. denied* 409 U.S. 859 (1972); *Vineyard v. Gardner*, 376 F. 2d 1012 (8th Cir. 1967); *Rodriguez v. Celebrezze*, 349 F. 2d 494 (1st Cir. 1965); *Wolf v. Secretary of Health, Education, and Welfare*, *supra*; *Sanders v. Weinberger*, *supra*; *LaBoy v. Richardson*, 355 F. Supp. 602 (D.P.R. 1972).

Substantial evidence has been defined by the Supreme Court as "... more than a mere scintilla. It means such reasonable evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, *supra*, at 401 (1971), quoting from *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

Where there is only a slight preponderance of the evidence on one side or another, the Secretary's findings must be affirmed. *Wolf v. Secretary of Health, Education, and Welfare*, *supra*; *Sanders v. Weinberger*, *supra*.

It is settled law that appellant bears the ultimate burden of persuasion to establish inability to engage in any substantial gainful activity and thus entitlement to disability benefits. *Gold v. Secretary of Health, Education, and Welfare*, *supra*; *Franklin v. Secretary of Health, Education, and Welfare*, *supra*; *Wolf v. Secretary of Health, Education, and Welfare*, *supra*.

The Secretary does not have the burden of making an initial showing of nondisability. *Ayala v. Secretary of Health, Education, and Welfare*, *supra*; *de Jesus Faria v. Finch*, *supra*.

The weight of the evidence relating to appellant's injuries suffered before February 22, 1973, indicates that he would not

be entitled to a period of disability based upon his injury suffered on May 21, 1968. His application indicates that he alleges an onset date of June 29, 1973, and thus did not request a retroactive consideration of this prior injury. However, it should be noted that the opinions of several physicians, notably Dr. Leve and Dr. Gieb, reinforce the view that appellant continued to work without severe impairment to his functioning. While it is true that Drs. Della Porta and Maggio recognized a 10% disability in regard to the use of his right hand, they viewed that to be a minimal and partial impairment. Even doctors of appellant's own choosing, such as Dr. Feldmahn, urged appellant's return to work four months after a corrective operation in 1970. Thus, appellant's impairment in the pre-1973 period does not constitute a "disability" under the Social Security Act, because in any event, appellant in fact returned to work full-time following the 1968 injury until February 1973, except for 10 months in 1970 before and after his carpal tunnel surgery.

It is true that appellant's treating physician, Dr. D. Sewall Miller, has stated on several occasions that appellant is totally disabled. However, the variations in Dr. Miller's own diagnoses appear quite puzzling, e.g., he noted four months after the injury that appellant was back at work without much difficulty, and in August of 1973 he found appellant's back problem quite minor. It was not until August of 1973, upon the urging of appellant, that another element entered Dr. Miller's opinions, viz., concern over appellant's employability. On May 21, 1974, Dr. Miller sought other theories of aggravation and stress which would account for the influence of appellant's underlying condition; however, even at that time he was not thoroughly convinced that appellant was totally disabled. By June 1974 he changed his opinion and advised that "degenerative arthritis" combined with obesity and a bilateral thoracic outlet syndrome caused appellant to be unable to work; his accident was viewed as being the triggering event of 25% of the disability. It seems that Dr. Miller was influenced by the urgings of appellant, i.e.,

he seemed to find a 25% partial impairment and to conclude that the balance of appellant's "disability" was attributable to employer reluctance to hire him.

However, pursuant to the 1967 Amendments to the Social Security Act the Secretary need only show, as has been done here, that the appellant is capable of performing substantial gainful work which exists in the national economy. 42 U.S.C. §423(d)(2). As recently stated by the First Circuit:

"... [T]he statutory standard is not employability as such but capacity — not whether claimant could actually locate a job but whether health limitations would prevent him from engaging in 'substantial gainful work . . . which exists in significant numbers either in the region where such individual lives or in several regions of the country.'" *Miranda v. Secretary of Health, Education, and Welfare*, 514 F.2d 996, 998 (1st Cir. 1975).

Therefore, the Secretary need not show that work exists in appellant's residential area, that any job vacancy exists, or that appellant would be hired if he applied for a job. *Lopez v. Secretary of Health, Education, and Welfare*, 512 F. 2d 1155 (1st Cir. 1975). This statutory interpretation has been upheld in every Circuit which has considered the question. See *Lopez v. Secretary of Health, Education, and Welfare*, *supra* at 1157, cases cited in footnote 2; *Miller v. Finch*, 430 F. 2d 321 (8th Cir. 1970).

Thus, local hiring practices, employer preferences for physically superior workers, and the claimant's actual chances for being hired are irrelevant in determining disability. *Lopez v. Secretary of Health, Education, and Welfare*, *supra*; *Gentile v. Finch*, 423 F. 2d 244 (3d Cir. 1970).

The hiring practices of a particular industry such as, e.g., reluctance to hire a worker with a record of work-related ac-

cidents, which might prevent appellant from being hired, are not relevant to the Secretary's determination that appellant is capable of engaging in substantial gainful activity. *Lopez v. Secretary of Health, Education, and Welfare*, *supra* at 1157; *Hillborn v. Secretary of Health, Education, and Welfare*, CCH Unemp. Ins. Rep. ¶14,495 (W.D.N.Y. September 29, 1975).

In any event, the weight of the medical evidence is contrary to Dr. Miller's conclusions. It is within the province of the Secretary as trier of fact to weigh all evidence and resolve material conflicts in the evidence. *Richardson v. Perales*, *supra*; *Gonzalez v. Weinberger*, *supra*; *Wolf v. Secretary of Health, Education, and Welfare*, *supra*; *Clark v. Weinberger*, 389 F. Supp. 1168 (D. Vt. 1974); *Hofacker v. Weinberger*, *supra*; *Sanders v. Weinberger*, *supra*.

Even though a court would have reached a different conclusion if it were weighing the evidence, the court may not displace the Secretary's choice between two fairly conflicting views. *Palmer v. Celebrezze*, 334 F.2d 306 (3d Cir. 1964); *Wolf v. Secretary of Health, Education, and Welfare*, *supra*; *Hofacker v. Weinberger*, *supra*.

For instance, in this case, Dr. Austin R. Leve noted two months after appellant's 1973 injury that appellant had a "mild residual partial disability," and told him that he could return to work. He noted that appellant could return to his regular work after a "few weeks" of avoiding excessive bending and lifting. Dr. Leve concluded, "I see no basis to anticipate any permanency here." Dr. Maggio noted in January, 1974 that appellant had a mild partial disability, but in April stressed that appellant had no disability from the accident of February 22, 1973. Dr. Egel, a Rochester orthopedic surgeon, noted that appellant was having "degenerative changes" of the cervical and lower thoracic areas, but that he certainly was not totally disabled. On October 11, 1974, Dr. Marvin N. Goldstein performed a complete neurological examination and found that

there was some evidence of spinal arthritis, but he could not clearly document the presence of the weakness and pain. The appellant's "giving way" during the examination raised some questions in the doctor's mind about the nature of appellant's impairments.

In this regard it should be noted that appellant must be disabled by reason of medically determinable impairments, as evidenced by clinical and laboratory findings. *Reyes-Robles v. Finch*, *supra*; *Toledo v. Secretary of Health, Education, and Welfare*, 308 F. Supp. 192 (D.P.R. 1970), *aff'd*, 435 F.2d 1297 (1st Cir. 1971); *Lopez v. Secretary of Health, Education, and Welfare*, *supra*. The appellant's complaints cannot provide the basis of entitlement when they are not supported by medical evidence. *Peterson v. Gardner*, 391 F.2d 208 (2d Cir. 1968). The legislative history of the new 1967 subsection of the Act 223(d)(3), is explicit and uncompromising in its intent to limit the court from being too liberal in finding disability, *Flake v. Gardner*, 399 F.2d 532 (9th Cir. 1968), and to emphasize the importance of medical factors in the determination of disability benefits. *Santiago v. Gardner*, 288 F.Supp. 158 (D.P.R. 1968). That legislative history states in part:

* * *

"The impairment which is the basis for the disability must result from anatomical, physiological, or psychological abnormalities which can be shown to exist through the use of medically acceptable clinical and laboratory diagnostic techniques. *Statements of the applicant or conclusions by others with respect to the nature or extent of impairment or disability do not establish the existence of disability* for purposes of Social Security benefits based on disability *unless they are supported by clinical or laboratory findings or other medically acceptable evidence confirming such statements or conclusions* * * *" (2 U.S. Code Cong. & Admin. News 1967, p. 2834 ff.) (Emphasis added.)

Furthermore, numerous cases have held that although appellant was suffering from a back ailment he could still engage in substantial gainful activity and accordingly he was held not disabled. *Pucci v. Richardson*, 369 F.Supp. 1344 (S.D.N.Y. 1973); *Dupkunis v. Celebrezze*, 323 F.2d 380 (3d Cir. 1963). Several doctors have diagnosed appellant as having arthritis, but arthritis is a condition which often arises in the course of aging and can be of varying degrees of severity. Its effect upon ability to work is not caused by its mere presence, but by the limitations in the mobility, flexion and bending imposed by such a condition. Thus, to state that a person has arthritis does not support an opinion that he is disabled unless the limitations imposed by the arthritis are described, and such description shows sufficient limitations to render said appellant unable to engage in substantial gainful activity. *Woods v. Finch*, 428 F.2d 469 (3d Cir. 1970); *Durham v. Gardner*, 392 F.2d 168 (4th Cir. 1968); *Brock v. Finch*, 313 F.Supp. 1187 (D. Kan. 1970). It should be noted that Dr. Miller stands alone in his assessment of the severity of appellant's arthritis.

Even though the impressions of appellant's treating physician may sometimes be entitled to more weight than that of a consulting physician, where the opinion of the treating physician contrasts with the opinions of other qualified physicians and other relevant evidence, the Secretary's determination that appellant is not under a disability will be supported by substantial evidence. *Bledsoe v. Richardson*, 469 F.2d 1288 (7th Cir. 1972); *Wolf v. Secretary of Health, Education, and Welfare*, *supra*; *Good v. Weinberger*, 389 F.Supp. 350 (W.D. Pa. 1975); *Torres v. Secretary of Health, Education, and Welfare*, 333 F.Supp. 676 (D.P.R. 1971). Opinion evidence by qualified physicians, such as Drs. Leve, Egel, Maggio, and Della Porta, that appellant is not disabled constitutes support for the Secretary's conclusion that appellant is not disabled. *Johnson v. Weinberger*, CCH Unemp. Ins. Rep. ¶14,114 (6th

Cir. February 12, 1975); *Griffey v. Finch*, 421 F.2d 187 (4th Cir. 1970); *Laws v. Celebrezze*, 368 F.2d 640 (4th Cir. 1966).

The function of deciding whether or not a person is under a disability belongs to the Secretary. A physician's conclusion on the issue of disability is not determinative of the ultimate fact of disability. 20 C.F.R. §404.1526; *Rodriguez v. Celebrezze*, 349 F.2d 494 (1st Cir. 1965); *Good v. Weinberger*, *supra*; *Lopez v. Secretary of Health, Education, and Welfare*, *supra*; *Hofacker v. Weinberger*, *supra*; *LaBoy v. Richardson*, 355 F.Supp. 602 (D.P.R. 1972). Although such opinions are entitled to some weight, the amount of weight given will depend upon the degree to which the opinions are supported by clinical and diagnostic findings. 20 C.F.R. §404.1526; *Durham v. Gardner*, *supra*; *Diaz v. Secretary of Health, Education, and Welfare*, 372 F.Supp. 463 (D.P.R. 1973); *LaBoy v. Richardson*, *supra*. As discussed, Dr. Miller's varying opinions seem to have been based not upon clinical changes but upon his growing awareness of appellant's employment prospects. The Secretary may properly accord greater weight to findings which are based on more extensive clinical and laboratory tests than to opinions of physicians which are unsupported by such objective evidence. *Kirkland v. Weinberger*, 480 F.2d 46 (5th Cir. 1973), *cert. denied*, 414 U.S. 913 (1973); *Sykes v. Finch*, 443 F.2d 192 (7th Cir. 1971); *Durham v. Gardner*, *supra*; *Blair v. Weinberger*, CCH Unemp. Ins. Rep. ¶17,755 (D.R.I. June 14, 1974); *Paskowski v. Finch*, 316 F.Supp. 1050 (W.D. Pa. 1970); *Bailey v. Gardner*, 269 F.Supp. 100 (S.D.W. Va. 1967).

Appellant alleges significant limitations due to pain. While the Secretary recognizes that pain in and of itself can sometimes be disabling, the inability of an individual to work without some pain or discomfort does not in and of itself satisfy the test for disability under the Act. Appellant has the burden of proving that, in fact, his pain or discomfort is of such severity that it precludes him from engaging in any substantial gainful activity.

Gaultney v. Weinberger, 505 F.2d 943 (5th Cir. 1974); *Candelaria v. Weinberger*, 389 F.Supp. 613 (E.D. Pa. 1975); *Mojica v. Secretary of Health, Education, and Welfare*, CCH Unemp. Ins. Rep. ¶14,291 (D.P.R. May 6, 1975); *Pickens v. Weinberger*, CCH Unemp. Ins. Rep. ¶117,609 (S.D.N.Y. April 29, 1974); *Rosario v. Secretary of Health, Education, and Welfare*, 324 F.Supp. 1321 (D.P.R. 1971); *Caplin v. Finch*, 316 F.Supp. 17 (W.D. Pa. 1970).

It is clear that the Secretary is not bound to accept as credible appellant's subjective testimony as to the existence or severity of his pain. *Reyes-Robles v. Finch*, *supra*; *Franklin v. Secretary of Health, Education, and Welfare*, *supra*; *Deyo v. Weinberger*, 406 F.Supp. 968 (S.D.N.Y. 1975); *Good v. Weinberger*, *supra*; *de la Cruz Sanchez v. Weinberger*, 382 F.Supp. 901 (D.P.R. 1974). In viewing a disability benefits claim, subjective symptoms must be evaluated with due consideration for credibility, motivation, and medical evidence of impairment. *Alvarado v. Weinberger*, 511 F.2d 1046 (1st Cir. 1975); *Deyo v. Weinberger*, *supra*; *Mojica v. Secretary of Health, Education, and Welfare*, *supra*; *Pickens v. Weinberger*, *supra*; *Ruiz v. Secretary of Health, Education, and Welfare*, CCH Unemp. Ins. Rep. ¶ 17,257 (D.P.R. May 7, 1973); *Rolenaitis v. Richardson*, 336 F.Supp. 1235 (E.D. Pa. 1972), *aff'd*, 475 F.2d 1396 (3d Cir. 1973); *Schmidt v. Secretary of Health, Education, and Welfare*, 299 F.Supp. 1315 (D.P.R. 1969). It is not necessarily inconsistent to find that an appellant suffers pain in fact, and yet is not so severely impaired as to meet the stringent test for disability imposed by the Act. *Gaultney v. Weinberger*, *supra*. This is the finding of the Secretary which now should be affirmed.

The credibility of the testimony of appellant and witnesses is a matter within the sole province of the Secretary, as trier of fact, to determine. *Wolf v. Secretary of Health, Education, and Welfare*, *supra*; *Sanders v. Weinberger*, *supra*; *Selig v.*

Richardson, 379 F.Supp. 594 (E.D.N.Y. 1974). The Administrative Law Judge to whom the Secretary delegated fact finding responsibility must decide issues of credibility. Great deference should be given his judgment since he heard the witnesses' testimony and observed their demeanor. *Deyo v. Weinberger*, *supra*; *Wylie v. Secretary of Health, Education, and Welfare*, 296 F.Supp. 738 (D. Conn. 1968).

The Administrative Law Judge may attack the credibility of appellant's assertion of disabling pain. The fact finder's conclusion based on more persuasive evidence, either that the asserted pain does not exist or is of such moderate degree so as not to foreclose gainful employment, is permissible. *Good v. Weinberger*, *supra*; *Halsey v. Richardson*, 441 F.2d 1230 (6th Cir. 1971).

With regard to appellant's obesity and alleged high blood pressure, there is no indication that appellant's condition of obesity interferes with his ability to engage in substantial gainful activity. In any event, the courts have held obesity to be a remediable condition and not disabling within the Act. *Stillwell v. Cohen*, 411 F.2d 574 (5th Cir. 1967); *Sikes v. Flemming*, 187 F.Supp. 872 (W.D. Mo. 1960). Also, the record does not show that appellant's high blood pressure has resulted in any end-organ damage, as required by Social Security Administration regulations, or that in any other significant way it affects his ability to work. *Leon v. Secretary of Health, Education, and Welfare*, 337 F.Supp. 905 (D.P.R. 1972); *Fields v. Celebrezze*, 218 F.Supp. 334 (E.D. Ky. 1963); *Ogden v. Celebrezze*, 211 F.Supp. 558 (D.N.J. 1962).

It should further be noted that appellant did not stop work permanently due to his injury of February, 1973, or to any other disabling event, but due to the fact that after he returned to work in May, 1973, his employer closed its operation in New York. Many courts have found significant the fact that an appellant stopped work for reasons other than disability. *Wolf*

v. Secretary of Health, Education, and Welfare, supra; Patton v. Finch, 305 F.Supp. 810 (W.D.N.C. 1969).

It is also significant that at least one physician, Dr. Egel, found that appellant's arthritic condition "long antedated" his injury of February, 1973. While Dr. Egel felt that the injury had aggravated the degenerative changes, he also found that appellant had essentially recovered from such exacerbation, in which event appellant's present condition would be similar to his condition of long standing with which he nonetheless worked prior to February, 1973. Courts have held that if appellant has worked with an alleged impairment over a period of years and there has been no significant deterioration in that impairment he cannot claim it disabling at the present. *Fishburn v. Gardner*, 452 F.2d 1004 (3d Cir. 1971) (lungs, back); *Cauthen v. Finch*, 426 F.2d 891 (4th Cir. 1970) (eye).

The fact that appellant has been found to be permanently and partially, or possibly even totally, disabled for purposes of workmen's compensation, is not binding on the Secretary. Such a decision is not determinative of the issue of disability for purposes of the Social Security Act. 20 C.F.R. §404.1525; *Otero v. Secretary of Health, Education, and Welfare*, 372 F.Supp. 361 (D.P.R. 1973). The Secretary must determine appellant's eligibility for disability benefits solely under the standards of the Social Security Act. *Timmerman v. Weinberger*, 510 F.2d 439 (8th Cir. 1975); *Little v. Richardson*, 471 F.2d 715 (9th Cir. 1972); *Serrano v. Secretary of Health, Education, and Welfare*, 340 F.Supp. 971 (D.P.R. 1972). Although a disability finding by another agency is entitled to some weight insofar as it is supported by objective medical evidence, necessarily it is not conclusive. *Cutler v. Weinberger*, 516 F.2d 1282 (2d Cir. 1975); *Robinson v. Richardson*, 360 F.Supp. 243 (E.D.N.Y. 1973); *Zimbalist v. Richardson*, 334 F.Supp. 1350 (E.D.N.Y. 1971). Apart from the fact that the term "disability" has a different meaning for different programs, it is the responsibility of the Secretary to make his own independent finding as to whether an

individual is "disabled" within the meaning of the Act. *Serrano v. Secretary of Health, Education, and Welfare, supra*; *Torres v. Secretary of Health, Education, and Welfare, supra*.

On the basis of a thorough consideration of the evidence of record, the Secretary concluded that appellant had not established that he suffered from any seriously restricting impairment at any time when he met the insured status requirements of the Act. As appellant did not establish an inability to engage in an occupation in which he had previously worked, namely that of checker, the Secretary was not obliged to elicit vocational evidence bearing on the availability of alternative job opportunities. *Reyes-Robles v. Finch, supra*; *Dupkunis v. Celebrezze, supra*; *Lopez v. Secretary of Health, Education, and Welfare, supra*; *Mann v. Richardson, supra*; *Crespo v. Secretary of Health, Education, and Welfare*, 303 F. Supp. 441 (D.P.R. 1969).

It is well established that if an insured individual suffers from an impairment which precludes heavy work, or work which requires certain kinds of physical exertion, but it is shown that he can engage in other light forms of substantial gainful activity, a "disability" within the meaning of the Act has not been established. *Torske v. Richardson*, 484 F. 2d 59 (9th Cir. 1973), cert. denied, 417 U.S. 933, (1974); *Woods v. Finch, supra*; *Miscannon v. Richardson*, 432 F. 2d 88 (3d Cir. 1970); *Gonzalez v. Weinberger*, CCH Unemp. Ins. Rep. ¶14,268 (D.P.R. April 22, 1975); *Pucci v. Richardson*, 369 F. Supp. 1344 (S.D.N.Y. 1973). The Secretary may take administrative notice of the existence of light jobs which appellant can perform without taking evidence from a vocational expert. *Hernandez v. Weinberger*, 493 F. 2d 1120 (1st Cir. 1974); *Floyd v. Finch*, 441 F. 2d 73 (6th Cir. 1971); *Breaux v. Finch*, 421 F. 2d 687 (5th Cir. 1970); *Brown v. Finch*, 429 F. 2d 30 (5th Cir. 1970).

On the basis of a thorough evaluation of the evidence of record, the Secretary determined that appellant failed to sustain

the burden of proof that he was under a disability within the meaning of the Act. It is submitted that the Secretary's determination is reasonable and should be affirmed by this court under the substantial evidence rule. 42 U.S.C. §405(g). *Richardson v. Perales, supra; Gonzalez v. Richardson, supra; Ginsburg v. Richardson, supra; Levine v. Gardner, supra.*

CONCLUSION

It is submitted that the Secretary's determination is supported by substantial evidence and is therefore entitled to affirmance.

Respectfully submitted,
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Johnson D. Hay/Publisher
Russell D. Hay/Board Chairman

The Daily Record

October 27, 1977

Re:

Lionel Bastien vs. Joseph Califano

State of New York)
County of Monroe) ss.:
City of Rochester)

Johnson D. Hay

Being duly sworn, deposes and says: That he is associated with The Daily Record Corporation of Rochester, New York, and is over twenty-one years of age.

That at the request of

Richard J. Arcara, U.S. Attorney
Eugene Welch, Esq., Of Counsel

Attorney(s) for
Appellee

On October 27, 1977

(s)he personally served three (3) copies of the printed ☐ Record ☒ Brief ☐ Appendix
of the above entitled case addressed to:

Ian C. DeWaal, Esq.
Monroe County Legal Assistance Corp.
80 West Main Street
Rochester, New York 14614

☐ By depositing true copies of the same securely wrapped in a postpaid wrapper in a Post Office maintained by the United States Government in the City of Rochester, New York.

☒ By hand delivery

Sworn to before me this 27th day of

October 1977

Russell D. Hay
Notary Public

Commissioner of Deeds

